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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WANDA BRANDSTETTER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT

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QUESTION PRESENTED

Whether the Illinois bribery statute upon which petitioner's conviction is based is unconstitutionally vague and overbroad, in violation of the First Amendment.

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Petitioner, Wanda Brandstetter, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, Fourth District, entered on May 28, 1982.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois is reported as *People v. Brandstetter*, 103 Ill. App. 3d 259, 58 Ill. Dec. 699, 430 N.E. 2d 731 (Fourth Dist. 1982), and is included as Appendix A to this Petition. The order denying the Petition for Leave to Appeal to the Illinois Supreme Court issued was entered on May 28, 1982, is not officially reported and appears as Appendix B.

JURISDICTION

The judgment and opinion of the Appellate Court of Illinois, Fourth District was entered on January 8, 1982. No Petition for Rehearing was filed in the Illinois Appellate Court. An order denying the Petition for Leave to Appeal to the Illinois Supreme Court was denied on May 28, 1982, and this Petition for Certiorari was filed within 60 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(c).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTES INVOLVED

Ill. Rev. Stat., ch. 38, sec. 33-1(a):

A person commits bribery when:

(a) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept; or

* * *

Ill. Rev. Stat., ch. 38, sec. 90-1:

1. No member of the General Assembly shall accept or receive, directly or indirectly, any money or other valuable thing, from any corporation, company or person, for any vote or influence he may give or withhold on any bill, resolution or appropriation, or for any other official act.

STATEMENT OF THE CASE

In the Spring of 1980, Illinois was one of the remaining States and the only major industrial state which had not yet ratified the Equal Rights Amendment. The question of ratification came up again before the Illinois Legislature in the form of House Joint Resolution Constitutional Amendment No. 1.

During the several days preceding May 14, when the Legislature was to vote on the question, there were efforts by both sides to persuade undecided legislators to vote for or against the amendment. The President of the United States, Jimmy Carter, called Representative Monroe Flinn, who was opposed to the Equal Rights Amendment, in Cahokia, and attempted to influence him to vote in favor of the Equal Rights Amendment. Monroe Flinn told the President that he had accepted campaign contributions from STOP ERA and believed that it would be less than honest to switch. (Defense offer of proof, Vol. IV pp. 111-15) Phyllis Schlafly, Chairman of STOP ERA, accused the President of near bribery in calling representatives and offering federal benefits in exchange for pro-ERA votes. (Defense offer of proof, Vol. IV, p. 114)

During that period of time it was generally known through the State, according to what Representative Gary Hannig told defense counsel, that STOP ERA was giving a minimum of $300 and a maximum of $2,000 to every representative who either voted against ERA or did not vote, (Defense offer of proof, Vol. IV, pp. 115-16) In fact, since 1978 the STOP ERA PAC had distributed more than $100,000 to Illinois legislators. (Vol. IV, p. 121)

Petitioner, a 54 year old mother and wife, with a Ph.D. degree in biology, had worked for passage of the Equal Rights Amendment since 1972, and had been very active for the past two years as a volunteer worker for the National Organization for Women (NOW). (R. Vol. VIII, pp. 8-14)

During the week prior to May 14, 1980, petitioner attended a meeting at the Equal Rights Ratification Project in Chicago. Sheila Clark, President of Illinois National Organization for Women, spoke at the meeting and told those present which legislators were undecided as to passage of the Equal Rights Amendment. One of those mentioned by Sheila Clark as undecided was Representative Nord Swanstrom, the Legislator named in the indictment and to whom petitioner later spoke, who had never voted on the Equal Rights Amendment. (Vol. VIII, pp. 21-22)

In anticipation that there would be a vote on the ERA bill on May 14, petitioner, in the company of several other men and women, traveled to Springfield. Later in the day, petitioner went to the rotunda, where there were perhaps 400 to 500 people. There, petitioner saw and spoke with Rep. Nord Swanstrom. (Vol. VIII, pp. 22, 51-55)

Representative Nord Swanstrom, a Republican whose district lies in the Northwest corner of the state near the Wisconsin and Iowa borders, had pledged after he received the nomination that he would vote against the Equal Rights Amendment. (Vol. VI, pp. 142, 160, 178) During the next three months Swanstrom received a total of $1,800.00 from the STOP ERA PAC. (Vol. VI, pp. 161-56)

Defense witnesses at trial, however, testified that Swanstrom told them in the Spring of 1980 that he was

undecided about ERA. Sheila Clark, the Illinois President of NOW, testified that Swanstrom told her his problem with ERA was not philosophical, but political, and that he did not really believe that the people of his district supported ERA. Sheila Clark offered to send in fund-raising experts if he voted for ERA. (Vol. III, pp. 189-90)

State Representative Goudyloch (Giddy) Dyer, a Republican from DuPage County, testified that during the two weeks preceding the vote, Swanstrom gave every indication of a person who was about to change his mind on ERA, and she told him that if he voted for ERA, there would be people in his district who would support him for re-election. (Vol. VII, pp. 176, 179) Swanstrom, however, claimed at trial that he had been opposed to ERA for several years and had never wavered in that stance. (Vol. VI, pp. 179-81)

In any event, organized groups in favor of ERA, who kept track of votes as absolutely solid "yes", or "no", or "maybe", began to place Swanstrom in the "maybe" column, and this became "general knowledge" among those working actively for ERA. (Vol. VII, pp. 204-5)

Petitioner testified at trial that when she approached Representative Nord Swanstrom in the rotunda, she gave him a card identifying herself as a field organizer for NOW and told him she could give him a month of her life and raise funds up to $1,000.00 in his district to offset the loss of STOP ERA contributions if he would vote his conscience on the issue. (Vol. VII, p. 159) Swanstrom did not recall this conversation. (Vol. VI, p. 197)

Later Swanstrom again returned to the rotunda, and petitioner testified that she saw her card fall to the floor. Petitioner testified that she listened to Swanstrom for a while and then stood back far enough from the crowd to be able to write something on one of her

calling cards. Petitioner testified that she was trying to restate what she had already said to him in words, but could not put so many words on a card. She heard Mr. Swanstrom say "I have to get back to the floor," and felt that she was running out of time. Petitioner testified that she couldn't finish what she wanted to say and wrote very quickly the following message: "Mr. Swanstrom: The offer for help in your election and $1,000 for your campaign for pro-ERA vote." (People's Exhibit No. 1) (C. 444) Petitioner testified that she handed the card to Swanstrom just as he started walking toward the Assembly Floor and called after him "Mr. Swanstrom, whatever you do—vote your conscience." (Vol. VIII, p. 25-30)

Representative Swanstrom read the card and put it in his pocket. The next day he showed it to a fellow Republican and the House Minority Leader, who called the Director of the Department of Law Enforcement. (Vol. VI, pp. 151-52, 199, 212-13)

Meanwhile, also on May 14, while intensive lobbying was going on for and against the Equal Rights Amendment, Phyllis Schlafly, Chairman of the STOP ERA organization who was also in Springfield that day, wrote a note to Representative Gary Hannig, who had already received $300 from STOP ERA, but who, according to news reports, had been offered $10,000 to switch his vote to "Yes" on ERA. (Vol. I, C. 80) The note referred to a fund raising advertisement that had been jointly sponsored by the Moral Majority and STOP ERA to defeat the Equal Rights Amendment and said, "Gary —STOP ERA has tremendous strength in your area. We had great returns from the 1-day anti-ERA ad. Stand firm and we will stand with you—Phyllis Schlafly." (Defense offer of proof Exhibit No. 3, C. 418) (Vol. IV, p. 132; Vol. IX, pp. 92-93) (This note was later

turned over to defense counsel prior to trial by the Court as additional discovery.) Phyllis Schlafly has never been prosecuted for bribery or legislative misconduct. Also on May 14 or 15 Phyllis Schlafly, in statements to the news media, called for grand jury investigations of the conduct of President Carter and Chicago's Mayor Jane Byrne. (Defense offer of proof, pp. 132-33, Vol. I, C. 81)

A few days later two investigators from the Department of Law Enforcement posing as agents of Representative Swanstrom visited petitioner at her home and asked for the $1,000.00. (Vol. VII, pp. 215-20) Petitioner told them that she intended to raise the money in Swanstrom's district and was willing to work for him if he would vote his conscience on ERA. Petitioner also said she was not involved in bribes or graft and wanted to talk to Swanstrom personally to clear this up. (Vol. VIII, pp. 34-35)

On June 5, 1980, the State's Attorney presented a proposed indictment, charging Wanda Brandstetter with bribery and solicitation of legislative misconduct, to the Sangamon County Grand Jury in Springfield. A grand juror asked whether Swanstrom was not offered help in his campaign from others in conversations throughout this time, and Swanstrom answered that the pro-ERA people offered to send fund-raising experts and bodies to distribute literature, but he thought there was nothing wrong with that because anybody can contribute to a campaign. There were several more questions relating to the lack of any difference between offering money and offering campaign assistance. (Supp. R. 15, 16-18)

> GRAND JUROR: Well—but it—I guess what I'm trying to do is equate the two in saying I don't see much difference in offering you $1,000 for your campaign and offering you ten bodies to come in and produce a—.

MR. ROBERTS: I don't think he's saying that there would be ten bodies if he voted for it.

They're saying—well, tell him what—.

THE WITNESS: Well, they're making general statements. We'll give you some help—.

GRAND JUROR: Well, it seems like an offer of something to enhance you in public office, to help you to stay there.

THE WITNESS: But not on the day of a vote an hour before it's going to be called.

GRAND JUROR: On, I guess I'm trying to understand. Maybe you can explain it to me, the difference between—.

THE WITNESS: I can't explain the legalities between the—.

GRAND JUROR: —between offering you money—it seems to me they're both help for your vote.

Besides, why would they be in there on May 14 offering you help in your November election? And that will help you if you can get the people to come up and help—tell—give you expertise on raising funds, wherever that may come from.

It seems to me they are in fact offering you something else.

Why isn't this brought to the grand juries too?

Maybe you can explain it for me.

MR. ROBERTS: Well, okay. My understanding is that the other offers of help were—were general.

They're not particularly demonstrable that—you know—it—it may well be implied that for their help for his vote they will offer help.

But it's not specific as this is—or as I suggest this may be, $1,000 for a pro-ERA vote.

And you're absolutely correct. There is a very fine line here.

A few moments later, a grand juror continued to state that he was having difficulty finding a line between offering $1,000 and offering a lot of bodies to come out and help. He continued:

• • •

> And there seems to me to be—you know—why—it seems to me there ought to be other people involved in the thing, and there ought to be charges on that if there is—the same thing.
> THE WITNESS: Go ahead.
> MR. ROBERTS: I think right now—and I can see what you're saying—but I think your job at this point to determine whether or not this conduct was over the line.
> GRAND JUROR: Doesn't the fact that you have this actually in writing make a big difference? Because these other people just talked to you. They didn't give you anything in writing, did they, that said we'll—you know—support your campaign? (Supp. R. 20)

The grand jury returned an indictment charging petitioner with bribery, in violation of Ill. Rev. Stat., Ch. 38, Sec. 33-1(a), and solicitation to commit legislative misconduct, in violation of Ch. 38, Sec. 90.

A motion to dismiss the indictment on the grounds that the statute was an unconstitutional limitation on freedom of speech was denied.

Following a jury trial petitioner was found guilty of bribery but not guilty of solicitation to commit legislative misconduct.

On appeal petitioner contended, *inter alia*, that the Illinois bribery statute, as written and as applied to petitioner, violated the Freedom of Speech Clause of the First Amendment. The Appellate Court of Illinois, Fourth District, rejected this argument and affirmed petitioner's conviction, saying: "while, as we subsequently set forth, we do not agree, we recognize that her conduct differed only subtly from that which is either statutorily permitted or constitutionally protected." (Appendix, p. 2) A petition for leave to appeal to the Supreme Court of Illinois was denied on May 28, 1982.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition because the Illinois bribery statute is unconstitutionally vague and overbroad and in any event is unconstitutional as applied to petitioner's activities. Petitioner was convicted of bribery under a statute which is so vague that it fails to give notice of which specific lobbying activities are unlawful and which are protected by the First Amendment to the United States Constitution.

It is fundamental that criminal statutes must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course of conduct one may lawfully pursue. *Connally v. General Construction Co.*, 265 U.S. 385, 393 (1926). And where First Amendment rights are at stake, even more stringent requirements apply. This Court has stated that the vagueness doctrine:

> requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts. *Smith v. Goguen*, 415 U.S. 566, 572-574 (1974).

Since we deal with a First Amendment issue, lobbying, *Buckley v. Valeo*, 424 U.S. 1 (1976), application of the vagueness doctrine to the terms of §33-1(a) requires careful scrutiny of the statute's provisions.

The overbreadth doctrine which requires the invalidation of sweeping statutes such as §33-1(a) has been articulated clearly and repeatedly by the United States

Supreme Court. Thus in *Shelton v. Tucker*, 365 U.S. 479, 488 (1961) the Court stated:

> . . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be achieved by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton v. Tucker*, 364 U.S. 479, 488 (1961).

In *Gooding v. Wilson*, 406 U.S. 518 (1972), the Supreme Court articulated the overbreadth doctrine even more forcefully.

> The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Even as to such a class, however, because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," *Speiser v. Randall*, 357 U.S. 513, 525 (1958), "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom," *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Application of these principles leads inevitably to the conclusion that the statute is unconstitutionally vague and overbroad.

The bribery statute upon which the indictment was based, Ch. 38, sec. 33-1(a), provides as follows:

> "A person commits bribery when: (a) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept;"

The phrase "property or personal advantage" can have a variety of meanings in the political and legislative context. According to *Webster's Third New International Dictionary*, "advantage" is defined as:

> the quality or state of being superior: a more favorable or improved position or condition . . . benefit, profit or gain of any kind . . . a factor or circumstance that gives superiority to its possessor or that puts him or it in a favorable or improved position . . .

Thus virtually anything which might confer a benefit or improved position qualifies under the terms of the statute.

For example, a public official can accept property, i.e., campaign posters, yet the terms of the statute appear to prohibit the acceptance of those posters. Other examples of the things which might qualify as property or personal advantage are innumerable. Does the production and tender of campaign posters or leaflets to support the legislators who have taken an affirmative stand on ERA constitute property? Does a public election endorsement of a legislator by a leader of the women's movement in return for a pro-ERA vote confer a "personal advantage?" When a lobbyist takes the check at dinner with a legislator following a favorable ERA vote, is property or personal advantage conferred? When the President of the United States or the Mayor of Chicago puts pressure on a legislator, is property or personal advantage conferred? One can think of similar uncertainties *ad infinitum*.

The statute also forbids the tender of property or personal advantage which a legislator "is not authorized by law to accept." The inherent vagueness of this phrase was recognized by the United States Court of Appeals for the Seventh Circuit in *International Society of Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978) where the Court of Appeals invalidated a prohibition of activities by individuals unless "authorized by law." The Court found the law to be unconstitutionally vague:

> Of more serious concern is the inclusion of the phrase "persons authorized by law" in the regulations. The court below found the words ambiguous. The City contends that the phrase need not be defined in the regulations because its meaning is clear; persons authorized by law are those who take part in protected First Amendment activities. We are unpersuaded. By not explaining who is "authorized by law," the regulations are deficient. Persons of common intelligence would be required to guess at the phrase's meaning and differ as to how the regulations should be enforced. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). The language implies that there also are persons who are not authorized by law to distribute literature or solicit contributions. Yet the regulations contain no guidelines to assist either the person who wishes to determine whether he is authorized by law or the official who is charged with the regulations' enforcement. (585 F.2d at 268).

A defendant's right to specific notice of the charges against him in his indictment for conduct "forbidden by law" must extend to the statute as well, otherwise the "forbidden by law" language or the "not authorized by law" language leaves the volunteer public interest lobbyist without guidelines as to what conduct is forbidden and what conduct is protected.

What offer of support could petitioner make that was not "authorized by law?" The prosecution did not include a reference to any provision of Illinois law in Count I of the indictment of this case. The section of the criminal code which the trial court concluded was applicable was §90-1 which defines legislative misconduct. However, the jury did not agree that the legislative misconduct law governed petitioner's offer of campaign support because it acquitted her of the charge of violating it. If the judge and jury could not agree on what kind of an offer of campaign help is "not authorized by law," how could petitioner have known ahead of time?

The grand jury in this case was equally confused as indicated by the questions put to the prosecutor. And if the grand jurors were confused, how could petitioner be expected to understand the law.

Even if the "not authorized by law" provision of §33-1(a) can be interpreted to include legislative misconduct as defined in §90-1 of the Illinois Criminal Code, §33-1(a) remains overbroad. Construed most narrowly, both sections broadly prohibit offers of political support contingent upon official acts or votes. Therefore, both §33-1(a) and §90-1 so interpreted could extend to cover an enormous range of protected activity because most if not all political support of legislators is based upon positions taken in votes on legislation.

> No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976).

Finally, §33-1(a), is overbroad because it governs lobbying "with intent to influence" legislators and other public officials. Webster's Third International Dictionary states that "influence" is defined as follows:

> to affect or alter the conduct, thought or character of by indirect or intangible means; . . . to have an effect on the condition or development of . . . .

Such a term covers the mental state of virtually everyone who communicates with a legislator about the legislative process to try to persuade the official on any issue. Any such person thus wishes to "have an effect on the condition or development of" the legislator's decision insofar as he or she can.

The overbreadth of §33-1(a) is emphasized by the fact it is in conflict with the Illinois Governmental Ethics Act, Ch. 127, §601-609. In its sweep, it is being applied to a citizen like petitioner who supports the Equal Rights Amendment as a matter of principle and offers campaign assistance in the hope of furthering that principle. She stands to receive *no* tangible personal benefit either from the passage of ERA or from the offer of support she made to Swanstrom. Rather she, like other ERA supporters, believes an amendment to the United States Constitution is necessary to better the status and condition of all women in the State of Illinois and the United States.

The Illinois Appellate Court did not deal effectively with these issues. The lower court concluded that petitioner's offer violated the statute because it was an offer of money in exchange for a specific official Act—i.e., a vote. The Court even seems to imply that an offer of campaign services in exchange for a specific vote would violate the statute—a position which petitioner contends is definitely in violation of the First Amendment. But why distinguish between money and services or other "favors"? Do legislators themselves violate the bribery statute by exchanging votes or engaging in "log rolling"?

Since numerous other activities regularly engaged in by lobbyists and legislators are not constitutionally distinguishable from the act of petitioner, her conviction is an egregious violation of the First Amendment right to Freedom of Speech.

CONCLUSION

For these reasons, we respectfully request that this petition for certiorari be granted.

Respectfully submitted,

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